

PCA ADOPTS GUIDELINES ON REMEDIES

After a public consultation phase initiated at the end of 2010, the Portuguese Competition Authority (“PCA”) made available, at the end of July 2011, the final version of its “Guidelines on the Adoption of Remedies in the Control of Concentrations” (“Guidelines”).

As clarified by the PCA, the Guidelines are “a set of de indications pertaining to the selection, design, execution and monitoring of remedies, within the procedure of previous control of concentrations between undertakings”.

Indeed, certain concentrations between undertakings (e.g., mergers or acquisitions or certain changes in the control of undertakings) are subject, according to Law No 18/2003, of 11 June 2003, to mandatory prior notification to the PCA, in so far as certain turnover or market share thresholds are met. After the assessment of their impact on competition, the PCA may decide not to oppose such operations, to prohibit them or not to oppose them by imposing certain conditions and obligations.

With its Guidelines, the PCA intends to “contribute to the transparency, efficiency and swiftness of these procedures and also to reinforce legal certainty”, having regard, on the one hand, to its own previous experience since 2003 in appraising this type

of operations; and, on the other hand, by considering also similar guidelines from other competition authorities, in particular those of the European Commission, of the British Competition Commission, of the French *Direction Générale de la Concurrence* and of the International Competition Network (ICN).

The Guidelines start of by addressing the main concepts and the regime of remedies, clarifying that commitments “are measures proposed by the parties [in the operation] that aim to eliminate the significant impediments to effective competition in the national market or in a substantial part thereof that may result from the notified operation”. It is up to the PCA to “assess if such commitments eliminate the competition concerns identified during the assessment of the notified concentration”.

In a second moment, the Guidelines recall the principles that should guide the PCA’s assessment of the commitments offered, e.g., those of legality, safeguard of rights of defence, participation and hearing of interested parties, legitimate trust, legal certainty and duly grounded decisions and, in particular, those of effectiveness, efficiency and proportionality.

The Guidelines then discuss the risks inherent to the two main types of commitments – structural

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commitments and behavioural commitments. As reminded by the PCA, structural commitments are those that bring about “a structural change of the market and correspond, in most cases, to the sale of assets or sets of assets”. They may correspond to an undertaking or a set of undertakings; or an asset or a collection of tangible assets (e.g., facilities or equipments) or intangible assets (e.g., licences, brands); and should preferably constitute a competitive, autonomous and viable business.

The risk analysis regarding this type of commitments should be made, according to the PCA, having regard to the following risks: *(i)* composition risks – scope of assets too constrained or inappropriate to attract a suitable purchaser or to allow it to operate such assets in an efficient and viable manner; *(ii)* purchaser risks – impossibility of finding a purchaser or the selected purchaser not being suitable; and *(iii)* asset risks – deterioration of the assets until completion of divestiture.

Behavioural commitments are those that aim to influence the behaviour of the parties, e.g., the non-adoption of certain commercial conducts, revocation or amendments to certain contracts or the granting of access to e.g., infra-structures, patents, licences, know-how or technologies.

They may correspond to an undertaking or a set of undertakings; or an asset or a collection of tangible assets (e.g., facilities or equipments) or intangible assets (e.g., licences, brands); and should preferably constitute a competitive, autonomous and viable business.

The main categories of risks identified by the PCA, as regards behavioural commitments, are: *(i)* specification risks – insufficient clarity in the specification of commitments that may lead to serious doubts as to their interpretation; *(ii)* circumvention risks – the commitments offered may result in other unforeseen adverse conducts; *(iii)* distortion risks – certain commitments may be susceptible of creating market distortions; and *(iv)* monitoring and enforcement risks – corresponding to the volume, complexity and asymmetry of information and longer periods of time.

Although considering that the choice of commitments should be made on a case-by-case basis and that that the two types of commitments could be complementary, the PCA made it clear that commitments which are structural in nature are preferable, inasmuch as it considers such commitments to be more effective, more suitable to resolve the competition concerns identified and encompass less monitoring and compliance costs.

In order to guarantee the feasibility of certain commitments, the PCA acknowledges that it may be necessary to appoint a monitoring trustee, in order to supervise and report periodically on their implementation. As regards structural commitments, the PCA foresees the possibility of having an independent divestiture trustee with an irrevocable trustee mandate for selling the assets or business in question, under the PCA's supervision.

The Guidelines establish that, as a rule, the maximum time-limit for the execution of a divestiture of assets commitment should not exceed 9 months, as of the date of the PCA's final decision or the takeover of control of the acquired undertaking.

As regards behavioural commitments, the PCA also considers that a fixed time-limit should exist, which should not, as a rule, exceed a period of 3 years.

For said purpose, the PCA considers advisable that commitments are presented preferably until the 20th working day of phase I and until the 40th working day of phase II.

The Guidelines address next procedural aspects, starting by recalling that the PCA may decide to approve a concentration with commitments in either the 1st or the 2nd phase of the procedure. For said purpose, the PCA considers advisable that commitments are presented preferably until the 20th working day of phase I and until the 40th working day of phase II.

The PCA acknowledges that, in phase II, it will strive to let known to the parties its concerns as soon as possible, in order to allow them to consider, within an appropriate time-frame, whether to submit commitments. Notwithstanding, the Guidelines recognise that, during certain fundamental phases of the procedure, the parties and the PCA may hold meetings in order to better assess the need and timings for commitments. The main substantial and formal requirements that commitments must obey are also established: e.g., they shall address the competition issues raised, specify their substantive and implementing measures, be signed by a person duly authorised to do so, be accompanied by the information necessary to the assessment of their suitability, sufficiency, feasibility and viability. The PCA also requires that a non-confidential version of the commitments is submitted for the purposes of “market testing”, i.e., that for when considered appropriate, the PCA may ask interested third parties and all other undertakings it sees fit (e.g. competitors) to evaluate the feasibility and effectiveness of the commitments.

The Guidelines anticipate that the PCA's final decision may contain a review clause of the commitments,

e.g., as regards deadlines or content. The Guidelines also mention the possibility of changes to the final conditions imposed in cases where the market circumstances in which the PCA's decision was based have changed significantly (possibility of revocation, waiver or substitution of commitments). Such situations may occur at any time and be raised *ex officio* or upon request by the parties showing good cause. However, the PCA deems that, apart from in exceptional circumstances, it does not consider likely that said changes in market circumstances should occur in the year following the clearance of the concentration. In any event, any PCA decisions in this regard will only produce effects for the future and shall be preceded by the hearing of the parties and interested third parties (if any). The competent sector regulators may also be consulted, should the PCA consider its opinion as useful or necessary.

Finally, the Guidelines remind what may be the consequences of the non-implementation of commitments: (i) opening of an *ex officio* procedure to assess the non-compliance; (ii) revocation of the previous PCA's clearance decision; (iii) the agreements underlying the concentration are to be considered null and void; (iv) fine up to 10% of the parties turnovers' in the last business year.

The PCA also states, in this context, that commitments are, in general, obligations set to achieve a given result. Thus, regardless of the reasons underlying a partial or total non-execution of commitments, the fact that the envisaged result

was not obtained will correspond to a breach of such commitments. Hence, the Guidelines state that, since the risks of implementation of the commitments are to be assumed entirely by the parties, in case of non-compliance the PCA will adopt a new decision that will overrule its previous non-opposition with remedies decision, which will correspond to a decision prohibiting the concentration. Such a decision will also order, if appropriate, the adoption of the necessary measures to the reestablishment of effective competition, which may correspond, e.g., to an order of separation of the undertakings or assets grouped or the end of the control acquired over the same.

The Guidelines end with model texts as annexes (remedies' document, divestiture trustee and monitoring trustee powers of attorney), drafted on the basis of the PCA's own experience and the guidelines of other competition authorities that are aimed to help the parties and promote "a greater consistency, effectiveness and transparency, in the relationship between the PCA and the undertakings".

As per above, the Guidelines were preceded by Draft Guidelines that were made available for public consultation. The PCA made known that it received contributions from 3 law firms and one undertaking on said Draft Guidelines. Following said contributions, the PCA drafted an Explanatory Note with the summary of the amendments introduced in the Draft Guidelines in view of the comments received.

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